No. 2686

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

MRS. GLENN D. HART and
GLENN D. HART,

Appellants,

vs.

WALTER ADAIR, J. T. EPPERLY, JAMES P. BURNS, F. S. GREEN and L. B. WALLACE,

Appellees,

vs.

W. C. HARDING LAND COMPANY, a corporation,

Appellant,

vs.

MRS. GLENN D. HART and
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Brief of Appellants Hart

On Appeal from the District Court of the United States for the District of Oregon.

E. A. LUNDBURG,
Solicitor for Appellants Hart.

JOLLY-RATELLE, PRINTERS 205 STARK STREET, PORTLAND, OREGON

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STATEMENT OF THE CASE.

This is a suit brought by Mrs. Glenn D. Hart and Glenn D. Hart, her husband, appellants, in the United States District Court of Oregon, against

the W. C. Harding Land Company, an Oregon corporation, (hereinafter called "Land Company"), and Walter Adair, J. T. Epperly, James P. Burns, F. S. Green and L. B. Wallace, defendants.

The individual defendants, above named, are appellees in this court.

In the lower court Mrs. Hart secured the rescission of three contracts of purchase of land in Douglas County, Oregon, entered into between herself and assignors with the Land Company. Rescission was granted by the lower court upon the grounds alleged in the complaint that the Land Company made false and fraudulent representations of material facts in regard to the subject matter of the contracts which were relied upon by Mrs. Hart and her assignors, and induced them to enter into the contracts to their injury, and the lower court in its decree entered a judgment against the Harding Land Company for the return of the moneys paid on the purchase price under each of the contracts rescinded, but denies appellants Hart a judgment therefor against the defendants Adair, Epperly, Burns, Green and Wallace as prayed for in appellants' complaint. It is from the decision of the lower court denying a judgment against the individual defendants that appellants Hart have prosecuted this appeal.

The contracts rescinded were for the purchase of Lots 17, 18, and 19, respectively, in Plat D, Roseburg Home Orchard Tracts, which property is located in Douglas County, Oregon. It was alleged

in the bill that as to each of the contracts rescinded that the Land Company was the agent of the land owners, appellees herein, in negotiating the sale of the land, and therefore personally liable upon rescission on the ground of fraud for the return of the moneys paid upon purchase price under each of the contracts respectively.

While it is true that as to each of the contracts the purchaser dealt only with the Land Company and each of the contracts were made in the name of the Land Company, and the owners of the land were unknown to the purchaser, until after the contracts were made, the appellants contended in their bill of complaint and upon the trial of the cause that the appellees, land owners, were liable as undisclosed principals for the return of the money secured by the fraud of their agent the Land Company and that the lower court erred in not entering a decree against the appellees herein for the return of the money paid under the contracts rescinded.

There is no controversy as to the facts to be considered by this court in deciding the questions for consideration on appeal in this case.

Let us note the allegations of the bill as to the relation of the Land Company and the appellees, land owners, under the contracts made with Mrs. Hart and her assignors, rescission of which was granted by the lower court. The allegations are:

"That on the 24th day of March, 1910. and for some time prior thereto, the defendants, Walter

Adair, J. T. Epperly, James P. Burns, F. S. Green and L. B. Wallace, were, and had been, the owners in fee simple of that parcel of real property, situated in the County of Douglas, State of Oregon, platted and known as 'Plat D, Roseburg Home Orchard Tracts.'

That said owners of said property under and by virtue of a certain agreement by and between said owners and the W. C. Harding Land Company, a corporation, organized and existing under the laws of the State of Oregon, granted a certain beneficial interest and equity in said tract of land to said corporation, for the purposes of exploitation and sale of the same by tracts and parcels according to terms and conditions in said agreement set out and contained; that by the terms of said agreement said W. C. Harding Land Company was duly authorized to solicit purchasers and make sales thereof under the name of the W. C. Harding Land Company, and the proper officers of the same were to sign the contracts, but deeds thereof to be given by said owners by their trustee.

That as a consideration for said services rendered and to be rendered by said corporation thereunder, said beneficial interest and equity in said land, platted and known as Plat 'D,' Roseburg Home Orchards Tracts, Douglas County, Oregon, was granted by said owners and consisted of a certain per cent based upon an agreed minimum price of $200 per acre; that in addition thereto said W. C. Harding Land Company were privileged

and permitted to enter into contracts on its account and to its further benefit for the planting, cultivating and caring for orchards on said tracts with possible investors making same a part of any or all contracts of sale therefor.

That said arrangement and agreement between the defendants herein, the said owners, Walter Adair, J. T. Epperly, James P. Burns, F. S. Green and L. B. Wallace and the W. C. Harding Land Company, was in writing, and a copy thereof marked exhibit 'A' is herewith attached and made a part of this complaint." (See Record, pages 4 and 5.)

Exhibit "A," which was attached to and made a part of the bill of complaint, appears in the Record, pages 52 to 67, as Plaintiff's Exhibit "A" and to which reference will be made later.

It appears that in the early part of the year 1909 W. C. Harding, the president of the W. C. Harding Land Company, an Oregon corporation, one of the defendants in this suit, entered into a deal whereby the defendants Adair, Epperly, Burns, Green, appellees herein, and one C. H. Carney, purchased what was known as the Rice & Rice ranch, a tract of land consisting of 461 acres of land lying near the town of Wilbur, in Douglas County, Oregon, paying therefor at the rate of $50 per acre. It was the purpose and intention of the appellees in acquiring the Rice & Rice ranch, to plat the same and sell the same through the Harding Land Company, as orchard land. It ap-

pears also that Wallace, one of the appellees herein, was not one of the original purchasers, but shortly after the purchase of the Rice ranch, acquired the interest of one C. H. Carney therein.

Upon the purchase of the Rice ranch the new owners entered into a contract in writing with the Land Company, under date of July 1, 1909, (See Record, Plaintiff's Exhibit "A," pages 52 to 67), for the subdivision and sale of said ranch, wherein it was provided that the Land Company was to have entire management of the sale of said tracts, as subdivided, for a period of one year from date, provided it made every effort to consummate the sale of said property. It was also expressly understood that unless the Land Company during said year negotiated at least $60,000 worth of bona fide sales of said property, it would forfeit any equity in the contract, other than the commissions to be paid.

It was further understood that the tracts were to be sold at the rate of $200 per acre, unless otherwise agreed to in writing.

The contract also provided that as fast as the land sales were consummated the first $13,000 of contracts were to be placed in the Douglas National Bank in favor of Napoleon Rice and associates from whom the owners purchased the property, and the next $10,000 of contracts shall be and become the property of the new owners of the property and the balance of the contracts and property shall be divided between the owners and the Land Com-

pany.

It was also agreed that all cash taken in from the sale of the tracts, except 17½ per cent commission allowed the Land Company on the selling price of $200 per acre, to cover expense of exploitation and sale of the land, shall be and become the property of the land owners, the same to be credited upon the $10,000 to be returned to the land owners, until paid.

The contract also provided that the land owners were not to be held responsible in any way for the planting contract and care of the trees that the Land Company makes with possible investors, nor were the land owners to benefit by the added price for planting and care.

It was also understood and agreed that the tracts were to be sold under the name of the W. C. Harding Land Company, and the proper officers of the same to sign the contracts, but deed only to be given by the owners or their trustee.

The above agreement as outlined was on September 10, 1910, merged into a supplemental agreement, between the appellees herein, (L. B. Wallace, having in the meantime succeeded to the interest of C. H. Carney), and the W. C. Harding Land Company.

In the contract as amended then follows a list of twenty-five purchasers of tracts in Plat "D," Roseburg Home Orchard Tracts, to whom contracts were issued prior to September 6, 1910, among which Glenn D. Hart and Mrs. Glenn D. Hart are

shown as purchasers of Lots 19 and 18, respectively, and the list shows contracts issued wherein the aggregate price of the land sold is $72,614.50.

The amended contract after stating that the Land Company in making said contracts with said purchasers had included and embodied in one contract an agreement for the sale of the land, and also an agreement for the planting of the land to trees and the cultivation thereof for a period of three years, and also stating that the Land Company had failed to deposit in the Douglas National Bank the contracts required by the provisions of the agreement under date of July 1, 1909, and that for such reasons it was to the interests of the Land Company and appellees herein that a new agreement be entered into modifying the agreement of July 1, 1909, and also embodying new covenants and conditions which the said parties have mutually accepted. Then follows the amended contract, which in effect briefly provides under paragraphs as follows:

1. That to pay a mortgage of $13,061 given to Napoleon Rice and associates to cover the balance of the purchase price of the property as provided in the former agreement and to refund the $10,000 advanced by the appellee on the purchase price of the property that the Land Company shall at the time of the execution of this amended contract deposit a sufficient number of the contracts entered into with purchasers to equal $23,061 at the rate of $200 per acre, with the Douglas National Bank,

providing, however, that the appellees were not to share in that portion of the amounts due under the contracts of sale for the planting and care of the trees, and also providing that the Land Company was to assign and transfer said contracts to appellees and include in said assignment a provision to the effect that appellees shall not be liable to cultivate and care for the lands embraced in said contracts. It was also provided in the amended contract that the Land Company was to guarantee the performance of the contracts on the part of the purchasers. The contract then provides for a division of the receipts under the contracts deposited and the application and payment thereof by the bank to the parties entitled to the same.

2. The contract then provides that all contracts in hand 90 days after date thereof shall be deposited in trust for collection in a bank to be agreed upon by B. L. Eddy for the appellees and the Land Company, under an agreement to divide equally the money received under the contracts so deposited applicable to the price of the land, after deducting the commission on sales due the Land Company.

3. The contract then provides that the Land Company may have an adidtional six months from date thereof, unless a further extension in writing be granted, to sell the unsold portions of the platted land, it being expressly understood that no contract of sale covering any portion of the land is to be made shall give the purchaser more than five years to make full payment, and upon every

such sale there shall be a cash payment of at least 20 per cent of the purchase price. The agreement then provides for reports of sales and division of all other contracts not deposited or thereafter entered into, and that the authority of the Land Company to make sales shall cease and determine at the end of the six months' period, and that the unsold portion of the land shall revert to the owners free from control and interest of the Land Company.

4. The contract then provides that the appellees shall convey to B. L. Eddy as trustee all of the lands which the Land Company was authorized to sell to hold the legal title in trust in order that he may execute conveyances to purchasers of parcels of said land when paid for in full, with full authority to plat the property at the expense of the Land Company.

5. The contract then provides that the deferred payments provided for in contracts shall draw 6 per cent interest per annum, and that the appellees shall be entitled to such proportion of said interest as the price of the land shall bear to the sale price of the various tracts and the Land Company shall be entitled to any interest paid upon such proportion of the deferred payments as shall be applicable to its cultivation contracts.

6. The contract then provides that the Land Company guarantees as to any sale contracts thereafter made full payment of the sums due thereunder from the respective purchasers and the Land

Company undertakes and agrees to perform the planting and cultivation features of every such contract and will at all times hold the appellees harmless from all costs, charges, expenses, damages and claims of every kind arising on account of any such contract made by the Land Company with any purchaser for planting or cultivating any of said lands.

7. This paragraph provides that in construing this agreement it is to be borne in mind at all times with reference to any settlement and division of profits or sale contracts, the appellees are not to share in any payments made on account of planting and cultivation of any of said lands, except under contracts set over and transferred to appellees on a division.

All of the contracts issued by the Land Company to Mrs. Hart and her assignors, were of the same form and substance, (same printed form being used), and in each instance the sale was made under like terms, except as to payments, and all contracts issued by the Land Company to purchasers of property in Plat "D" conformed to the terms and conditions imposed thereon under the appellees' contract with the Land Company.

The contract for the purchase of Lot 18 made with Mrs. Hart by the Land Company appears in full in the Record (see pages 67 to 70, Plaintiff's Exhibit "E"), and bears the date of March 24, 1910.

The contract for the purchase of Lot 19 made with Mrs. Hart's assignor Glenn D. Hart, bears

date of March 24, 1910. (See Plaintiff's Exhibit "F," Record, page 70.)

The contract for the purchase of Lot 17 made with Mrs. Hart's assignor Mrs. Ella Peterson, while bearing date of October 15, 1910, was in fact entered into on April 15, 1910, upon which date the contract acknowledges the payment of $100. (See Record, page 71, Plaintiff's Exhibit "G.")

The court's particular attention is called to the fact that it appears from the contract between the appellees and the Land Company that it was the clear understanding between the parties to that contract that the Land Company in making contracts with purchasers might include in such sale contract an agreement for the planting and cultivation of the tracts sold.

This fact is further demonstrated by the testimony of W. C. Harding, the president of the Land Company. He testified:

"If these people (appellees) purchased the Rice & Rice ranch, we proposed subdividing and selling it as orchard land, which they understood. It was the suggestion prior to the time they purchased that it was to be planted where the owner desired." (See Record, page 168.)

In keeping with the agreement between the appellees and the Land Company, the appellees deeded the Rice ranch to B. L. Eddy as trustee on September 10, 1910, a copy of which deed appears on pages 65 to 67 of the Record, as Plaintiff's Exhibit "B," in which deed following the description of the prop-

erty conveyed, portions of which were platted as "Plat D," Roseburg Home Orchard Tracts, the purposes of the trust was set forth in the following language, to-wit:

"To have and to hold to the said B. L. Eddy forever in trust, however, to hold and dispose of the same for the benefit of the grantors herein, with full power and authority in said trustee to make, execute and deliver deeds, conveyances, contracts and assurances of title with covenants of warranty, conveying said lands in suitable parcels, when paid for in full, to purchasers thereof through the W. C. Harding Land Company, a corporation, incorporated, organized and existing under the laws of the State of Oregon, and having its principal office at Roseburg, Oregon, in accordance with the terms of a certain agreement in writing providing for the sale of said lands and dated September 10, 1910, and executed on the one part by the grantors herein and on the other part by the said W. C. Harding Land Company. And in case there shall be any residue of said land remaining unsold through or by the said W. C. Harding Land Company under the terms of said agreement of September 10, 1910, and after the termination of the authority of said W. C. Harding Land Company to make sales thereof, such residue of land shall be reconveyed by said trustee to the grantors herein, or their assigns. And the said trustee is duly authorized and empowered to make, execute, acknowledge, and file for record in the office of the County Clerk of

Douglas County, Oregon, a plat and dedication of said lands dividing the same into tracts and laying off and designating roadways through the same, and to do whatever may be incidental to the proper platting of said tract, in accordance with the statutes of the State of Oregon, in that behalf provided.

And we, the grantors above named, do covenant to and with the grantees of our said trustee, and grantees being those hereafter named in deeds to be executed by said trustee, that the above granted premises are free from all incumbrances excepting a mortgage for the principal sum of thirteen thousand and sixty-one dollars and interest, made in favor of N. Rice and associates and recorded in the Records of Mortgages of Douglas County, Oregon, which mortgage the grantors herein are to pay and discharge as required by its terms; that we will and our heirs, executors and administrators shall and will forever warrant and defend the title of the above granted premises and of the respective parcels thereof to be conveyed by our said trustee to the grantees thereof, their heirs and assigns forever."

It is the contention of the appellants that upon the facts established under the pleadings, that under the law the Land Company and the appellees herein are both liable for the return of the moneys paid under each of the contracts rescinded on account of the fraudulent representations made by the Land Company in procuring the contracts, and

that the decree of the lower court is erroneous in failing to include a judgment against the appellees for the return of the moneys paid with interest on the purchase price of the land under each of the contracts rescinded.

ASSIGNMENTS OF ERROR.

The appellants have assigned the following errors by the lower court in the decree entered November 9th, 1914, and now seek a modification of said decree to correct such errors, to-wit:

I.

In failing to decree that plaintiff was entitled to have relief against the individual defendants, Walter Adair, J. T. Epperly, James P. Burns, F. S. Green and L. B. Wallace, owners of the land involved, as prayed for in the bill of complaint. (Record, page 232.)

II.

In failing to include in the decree a personal judgment against the individual defendants, Walter Adair, J. T. Epperly, James P. Burns, F. S. Green and L. B. Wallace, for the return of the money paid on each of the several contracts issued by the W. C. Harding Land Company to the plaintiff and her assignors. (Record, page 233.)

POINTS OF LAW AND AUTHORITIES.

I.

The original and supplemental contracts between the appellees and the Land Company was one of agency, and not of sale.

Agency created, how?

Central Trust Co. v. Bridges, 57 Fed. 753 at 764.

An agency contract, not sale.

Briggs v. Foster, 137 Fed. 773.

In re Galt, 120 Fed. 64, 566 C. A. 470.

Williams Mower & Reaper Co. v. Raynor, 38 Wis. 119.

II.

It is a firmly established rule of law that a principal is liable upon a written simple contract entered into by an agent in his own name within his authority, although the name of the principal does not appear in the instrument and was not disclosed, and the person dealing with the agent supposed he was acting for himself, and this rule obtains as well in respect to contracts which are required to be in writing as to those where a writing is not essential to their validity.

9 Cyc. 387.

Ford v. Williams, 21 How. (U. S.) 287; 2 U. S. (Miller) 790.

New Jersey Steam Nav. Co. v. Merchants Bank, 6 How. (U. S.) 344; 16 U. S. (Curtis) 722.

III.

An undisclosed principal may be charged with responsibility for and avail himself of the benefits of the acts of his agent; and hence when the relationship of principal and agent is found to exist in such a case, the ordinary rules of responsibility of the principal to third persons for all acts of his

agent within the apparent scope of his authority are established.

Brooks v. Shaw, (Mass.), 84 N. E. 110.

Byington v. Simpson, 134 Mass. 169.

IV.

A principal is bound by the fraud of his agent in making a sale, in relation to that sale,—as much so as the principal would be if acting in person; and this notwithstanding the fraud was perpetrated without the knowledge or approval, and against the consent, of the principal.

Alger v. Anderson, 105 Fed. 105.

Daniel v. Mitchell, 1 Story, 172, Fed. Case No. 3562.

The rule is the same whether the agency was disclosed or not.

Doggett v. Emerson, 3 Story, 700, Fed. Case No. 3960.

Mason v. Crosby, 1 Woodb. & M., 342, Fed. Case No. 9234.

V.

The appellees, under their amended contract with the Land Company expressly ratified the contracts made with purchasers which included a provision for the planting and cultivation of the tracts sold, and by receiving the benefit of all such contracts became bound by the fraudulent representations of the Land Company in securing such contracts.

Story's Equity Jurisprudence, 10th Ed., Sec. 193.

ARGUMENT.

I.

Whether the appellees are to be held liable for the return of the moneys paid under each of the contracts rescinded is to be determined by their legal status with respect to each of said contracts.

The lower court has determined that the Land Company made fraudulent representations of material matters which entitled the appellants to a rescission of the contracts, and a return of the moneys, with interest, paid under each of the contracts by the Land Company.

It is the contention of appellants that the appellees are equally responsible with their selling agent, the Land Company, for the fraud of the latter, and under the errors assigned, this court is called upon to determine that question as a matter of law.

The legal status of the appellees with regard to the contracts rescinded is to be determined by the construction of the contract (Plaintiff's Exhibit "A," pages 52 to 65, Record), between them and the Land Company. This construction is aided by reference to the deed (See Record, pages 65-67) from appellees to B. L. Eddy, Trustee, made pursuant to said contract as well as by a consideration of the circumstances attendant upon the purchase of the land and the making of said contract by appellees with the Land Company, a historical recital of which largely appears in the contract itself. From these sources it is clear that the

appellees purchased the Rice ranch for the sole and single purpose of having the Land Company sell it for them. The ranch contained a little over 461 acres, for which they paid at the rate of $50 per acre, or a total of $23,061, making an initial payment of $10,000, and giving a mortgage to secure the payment of the balance, $13,061. The sole purpose of the appellees in purchasing the property was for its exploitation and sale thereof by the Land Company as orchard land. Under the original contract between the appellees and the Land Company, the latter was given the exclusive authority for a period of one year to make sales of the property in tracts as platted. All but 100 acres of the property was platted. (See Plat Plaintiff's Exhibit "C," page 40, Record.)

In order to expedite the sale of the tracts and evidently for the convenience of all concerned the appellees Adair, Epperly, Burns, Green and Wallace, all of whom excepting Epperly, were married, (see Plaintiff's Exhibit "B," Record, page 65), the Land Company was authorized to make sale contracts in its own name, but the appellees or their trustee were to give deeds.

The original contract contains the following provision, "It is furthermore agreed that the selling price of this land shall be $200 per acre, and that the party of the first part (appellees) shall not be held responsible in any way for the planting contract and care of the trees that the party of the second part (Land Company) makes with possible

investors, nor shall the party of the first part benefit from the added price that will be put onto the land for such planting and care." (See Record, page 55.)

Mr. Harding, President of the Land Company, says that he drafted this contract and that the appellees understood that where a purchaser desired the land was to be planted. (See Record, page 168.)

Under the original contract it was provided that the Land Company was to receive 17½ per cent commission, which it was allowed to deduct from the first cash received, and that excepting the amount retained as commission, that as fast as the sales are made that the first $13,000 worth of contracts were to be deposited in the Douglas National Bank to pay the mortgage, and the next $10,000 worth of contracts shall be and become the property of the appellees, and that less the commission all cash taken in from sales shall be and become the property of the appellees, until the purchase price of the Rice ranch was paid in full, and the balance of the contracts and property shall be equally divided between the parties to the contract. Appellees' contract with the Land Company bears date of July 1, 1909, and the supplemental contract was made on September 10, 1910. The court's attention has already been called to the fact that all of the sale contracts in controversy were entered into with Mrs. Hart and her assignors prior to September 10, 1910.

Under the supplemental contract the appellees renewed all of the provisions of the original selling agreement with the Land Company and recited the fact that in making sale contracts the Land Company had included and embodied in one contract for the sale of the land at $350 per acre an agreement to plant the land to trees and to cultivate and care for the land for a period of three years. With full knowledge of the kind and character of the contracts issued to Mrs. Hart and her assignors the appellees under the provisions of their amended contract with the Land Company fully ratified the same and extended the privilege to the Land Company to make sales for a further period of six months from the date thereof, but the vital and outstanding feature of both the original and supplemental contracts with the Land Company is that on the sale price of the land under each sale contract made all the money received was the property of the appellees, less 17½ per cent commission retained by the Land Company. All of the contracts made under the supplemental agreement the Land Company was compelled to deposit as provided by the appellees, and out of the proceeds the Land Company in addition to 17½ per cent commission was to be paid that part of the sale price of the land in excess of $200 per acre to compensate it for the cultivation and care feature of the sale contracts. It is evident however that the appellees realized that in accepting the sale contracts made by the Land Company in-

cluding the cultivation agreement that they became fully liable for the entire performance of all of such contracts made, and for that reason they required the Land Company not only to guarantee the full payment and performance of all sale contracts made on said lands described in the agreement of July 1, 1909, on the part of the respective purchasers, but future contracts made as well. Appellees' supplemental contract with the Land Company also provides that at the expiration of 90 days from its date the Land Company should render a full statement of all business transacted, and a like statement at the end of the six months extended sales period. Thus it is readily determined from the entire dealings and operation of the Land Company on behalf of the appellees, that the Land Company, under its authority to make sales, was at all times the agent of appellees, and for the services rendered received 17½ per cent commission, the compensation for planting and care, and after the original purchase price had been returned to appellees, the balance of the profits was divided equally between the appellees and their agent, the Land Company.

Everything the Land Company did, every contract of sale made was under the direction and control of the appellees. The terms and conditions of every contract of sale made by the Land Company were made in accordance with the direction of appellees, by their direct authority, and the appellees, if it was not their intention under their

original contract with the Land Company that the cultivation and care agreement should be incorporated in sales contracts made, they expressly ratified all such contracts made or to be made under the terms of the supplemental contract, by expressly providing that all the money received on the stated sale price of the same should be and become their property, less the commission paid to Land Company, thus receiving the benefits of all such contracts made.

So much for a general discussion of the relationship of the appellees and the Land Company under the original and supplemental contracts authorizing the Land Company to sell the land.

In the case of *Central Trust Co. v. Bridges*, 57 Fed. 753, at 764, in a case where a question of agency was to be determined, Taft, Circuit Judge, stated: "An agency is actually conferred very much as a contract is made, i. e., by agreement between the principal and agent that such a relation shall exist. The minds of the parties must meet in establishing the agency. The principal must intend that the agent shall act for him, and the agent must intend to accept the authority and act on it, and the intention of the parties must find expression either in words or conduct between them."

In the case at bar the contract of agency is in writing, the appellees authorized the Land Company to sell their land, and stipulated the manner, time and conditions of sale, and the Land Company agreed to act and did act as their agent and made the contracts of sale in controversy.

Appellees' counsel in the lower court contended

that the contract between appellees and the Land Company was one of sale rather than agency. Let us examine the contract from that standpoint.

It is the appellants' contention that the contract is a contract of agency. Under no possible construction could it be termed one of sale; that is, an agreement under which the Land Company agreed to buy anything.

The money to be paid the owners under the agreement was not to be paid upon a sale to the Land Company, but upon a sale of the land by that company. In other words, it was to account for the proceeds of the sale of the land as fixed by the contract. There is wanting the essential element of a sale "an agreement to pay a price." The Land Company took upon itself no obligation of this character. It assumed no debt to the appellees.

In the case of *Briggs v. Foster*, 137 Fed. 773, the court held the contract to be one of agency where defendants, being in absolute control of a mining corporation, through three of its directors, contracted with another corporation for the sale of a large number of shares of stock held by defendants at the price of thirty cents per share, with the privilege of retaining all that the sellers secured above such price as their commission, and the sellers to pay three cents of every thirty cents received for a share of the stock to the corporation and twenty-seven cents to defendants, and held the defendants liable for fraudulent representations made by such sellers in *prospecti* issued to induce

the purchase of stock.

In re Galt, 120 Fed. 64, 56 C. C. A. 470, where the contract provided that the second party thereto should account for 60 per cent of the list price of goods sold, and would pay cash or give his notes for the goods on hand at the expiration of 12 months, if required by the first party, it was held that the contract was a contract of agency, and not of sale.

In the case of *Williams Mower & Reaper Co. v. Raynor,* 38 Wis. 119, the court held, a contract that the second party might sell, that he should pay a fixed price in farmer's notes or cash; that he should guarantee the notes; that the goods should be invoiced to him as bought; that the first party should have the option to require the second party to pay the stipulated prices of those remaining at the end of the season, was held to constitute the second party as agent, and not a purchaser. This is the legal effect of the contract between the appellees and the Land Company. In that contract the Land Company had power to sell, but the proceeds of the sale to the extent of the fixed price of the property, less commission, was the property of the appellees for which the Land Company would have been liable for embezzlement if they had not accounted. See *Briggs v. Foster, supra.*

II.

As to each of the contracts rescinded, made by Mrs. Hart and her assignors with the Land Company, at the time of the execution of said contracts

the appellees' interest in the transactions was unknown to the purchasers, appellants contend however that the appellees are bound under each of said contracts made by their duly authorized agent, that the contracts were made in the name of the Land Company for their benefit.

This liability exists under the rule stated in 9 Cyc. 387, to-wit: "It is a firmly established rule of law that a principal is liable upon a written simple contract, entered into by an agent in his own name, although the name of the principal does not appear in the instrument and was not disclosed and the person dealing with the agent supposed he was acting for himself, and this rule obtains as well in respect to contracts which are required to be in writing, as to those where a writing is not essential to their validity." This rule was followed in the case of *Ford v. Williams,* 21 How. (U. S.) 287; 2 U. S. (Miller) 790, where an undisclosed principal sought to enforce such a contract, and the court held, "The contract of the agent is the contract of the principal and he may sue or be sued thereon, though not named therein, and notwithstanding the rule of law that an agreement reduced to writing, may not be contradicted or varied by parol, it is well settled that the principal may show that agent who made the contract in his own name was acting for him. This proof does not contradict the writing, it only explains the transaction."

Also, "When a party deals with the agent, with-

out any disclosure of the fact of his agency, he may elect to treat the after discovered principal as the person with whom he contracted."

Under this rule, therefore, the appellees cannot deny the binding force and effect upon them of the contracts in controversy.

III.

It having been determined that the appellees cannot escape responsibility upon the contracts because they were made in the name of the Land Company.

Let us consider the application of the rule "an undisclosed principal may be charged with responsibility for and avail himself of the acts of his agent, and hence when the relationship of principal and agent is found to exist in such a case, the ordinary rules of responsibility of the principal to third persons for all acts of his agent within the apparent scope of his authority are established. In the case of *Brooks v. Shaw,* (Mass.), 84 N. E. 110, one Shaw bought an express company operating between Boston and Cambridge from one Sawin who operated it under the name "Sawin's Express." Shaw, without notice to the public, continued to operate it under the same name and continued Sawin in his employ as manager as before.

Sawin was restricted in the settlement of all claims without consulting Shaw except for sums less than $3.00. One B sent a fine dress by Sawin's Express from Boston to Cambridge under a contract limiting the liability for loss to $50. B sup-

posed she was dealing with Sawin as principal and having no notice of Shaw's ownership and control of the Sawin's Express. Sawin told B to get a new dress and he would pay for it, but Shaw refused to carry out Sawin's settlement. B instituted an action against Shaw and was permitted to recover the value of the dress, under the rule last stated. In the case of *Byington v. Simpson,* 134 Mass. 169, the court, discussing the application of the same rule, held "The doctrine that an undisclosed principal may be charged with responsibility for and avail himself of the benefits of the acts of his agent is well settled."

In the case at bar the appellees under their contract with their agent, the Land Company, and the supplement thereto, have availed themselves of the full benefit of the contracts rescinded and are therefore chargeable with all acts of their agents in securing the same.

IV.

It is therefore the contention of the appellants that the appellees are bound by the fraud of their agent in making the sale, as to each of the contracts which have been rescinded because of the fraudulent representations in securing the same, in relation to each particular sale, as much so as if they had in fact entered into each of the contracts rescinded in person, and this notwithstanding the fraud was perpetrated without their knowledge or approval.

In the case of *Alger v. Anderson,* 105 Fed. 105,

this was a suit for the rescission of a contract of purchase of coal and timber lands in Tennessee, and to secure the return of the moneys, with interest paid thereon. Anderson, the owner of the land, had, it appears, given a title bond to Sheridan and Green, doing business under the name of Sheridan, Green & Co., who at the time of receiving the option, were already negotiating with the knowledge of Anderson for the sale of the lands under an agreement that they should have all over a certain price per acre received.

Sheridan and Green made false representations to Alger, inducing the purchase of the land. The court held that the title bond was secured by Sheridan and Green to insure their profit, and that the agency in fact existed. and that Anderson was responsible for the fraud of the agents by which the sale was induced, although he had no knowledge thereof.

In the case of *Daniel v. Mitchell, et al.*, 1 Story, 172, Fed. Cases No. 3562, Todd, the holder of the title bond, had also an agreement that he should sell the land, and receive one-half of the excess over $4.00 per acre, if he should succeed in making a sale. Todd employed one Haskins to aid him in effecting a sale and made the contract of sale in his own name. Rescission was granted of the contract. All the owners were held liable in aid of Todd, against whom a decree went as having received all of the purchase money, from his having acted as their agent. Todd was held to be the

agent of the owners for the reason that an agreement was tacked on the title bond that Todd should sell and be compensated by the excess over a given price. He therefore sold for the owners and was their agent.

In *Doggett v. Emerson,* 3 Story, 700, Fed. Cases No. 3960, Emerson, acting for himself and others owning land, gave to Williams a title bond, agreeing to make title on being paid a stipulated price per acre. Willams made a sale and Emerson and associates caused deed to be made by the state direct to the purchasers. Williams made untrue representations to induce the sale. The owners were held liable for his misconduct, upon the ground that the evidence showed that the real relation was that of principal and agent and that the title bond was given to conceal the agency of Williams, who was given all that he could realize over a fixed price. In *Mason v. Crosby,* 1 Woodb. & M., 342, Fed. Cases No. 9234, the facts were much the same as those in *Doggett v. Emerson, supra.* It might be mentioned in passing that the three last cases cited were tried before that eminent jurist, Justice Story, and that the opinion written in the case of *Mason v. Crosby, supra,* was perhaps the last penned by him, the decree thereon was entered by his successor. Applying the law as asserted in these decisions of Justice Story as well as in the case of *Alger v. Anderson, supra,* to the facts in the case at bar, it would seem that the liability of the appellees for the fraud of the Land Company

as to the contracts in controversy is so evident as not to call for further discussion.

V.

A discussion of the question before the court would not be complete however without reference to the "planting and cultivation feature of the contracts rescinded." Under the facts as alleged in the bill and established by the evidence, all of which are set out in the statement of the case, it appears that the appellees, with full knowledge of the kind and character of the sale contracts made by their agent, the Land Company, which included the planting and cultivation feature, formally ratified such contracts under the terms of their supplemental contract with the Land Company, by retaining the benefits of all such contracts made by their selling agent. They must be held to have ratified such contracts when they provided for the retention as their property of the proceeds from all sale contracts as received, less commissions, applicable to the sale price of the land. (Plaintiff's Exhibit "A," Record, pages 52-67.)

While it is the contention of appellants that it was the intention of the appellees when they entered into the contract for the sale of the lands by the Land Company that the sale contracts made were to contain this very agreement for planting and care when the purchaser so desired the facts as to which we have already discussed, yet the appellees accepted the contracts made with the planting and care feature included and therefore

became bound by the fraud committed by their agent in securing them.

The rule is stated thus by Justice Story, "The same general principles apply, whether the fraud was perpetrated by the party directly interested, or by an agent, if the act in which the fraud was committed be adopted by the principal. If the latter persists in taking the benefits of his agent's fraud, it is immaterial whether the fraud was originally concocted by the principal or by the agent; the principal will be implicated to the fullest extent, if he adopts the acts of his agent."

"For a third person, by seeking to derive any benefit under such a transaction, or to retain any benefit resulting therefrom, becomes *particeps criminis,* however innocent of the fraud in its inception." (Story's Equity Jurisprudence, 10th Ed., Sec. 193.)

IN CONCLUSION.

In view of the errors assigned and for the reasons above shown the decree entered by the lower court should be modified accordingly and the appellant be granted relief against the appellees herein according to the prayer of her complaint.

Respectfully submitted,

E. A. Lundburg,
Solicitor for Appellants Hart.

CERTIFICATE.

I, E. A. Lundburg, solicitor for appellants Hart, hereby certify that the foregoing is a true and correct copy of the said Appellants' Brief, and of the whole thereof, in the within entitled cause.

.....

Solicitor for Appellants Hart.

ACKNOWLEDGMENT OF SERVICE.

State of Oregon, County of....., ss.

I hereby acknowledge service of Appellants' Brief in the within entitled cause, on me in .....County, Oregon, this.....day of ....., 1916, by receipt personally of a duly certified copy thereof.

.....

Attorney for Appellees Adair, Epperly, Burns, Green and Wallace.